STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 29, 2014
v	No. 312098 Oakland Circuit Court
STEVEN ANTHONY JAMES, Defendant-Appellant.	LC No. 2012-240771-FH

Before: MARKEY, P.J., and SAWYER and WILDER, JJ.

PER CURIAM.

Defendant appeals by right his convictions of two counts of knowing or intentional possession of less than 25 grams of a controlled substance (cocaine and heroin), MCL 333.7403(2)(a)(v). He was sentenced to 365 days in jail. We affirm.

Defendant testified at his bench trial that he was working for a janitorial services company and was at an apartment cleaning. The owner of the company left him there with another man, Adam Shatara, whom defendant did not know. Shatara became very upset and ordered defendant at gunpoint to go to other rooms to insure that there was no one else at the apartment. Shatara gave defendant a baggie, which defendant put into his pocket, and a white substance, which defendant smeared on his nose. When Shatara's phone rang and he stepped away, defendant exited the apartment where he immediately saw police. The police testified that they had received a call that someone was being held at gunpoint and went to the apartment. They saw defendant outside the apartment, stopped him and searched him, finding a baggie containing crack cocaine and heroin. They also found Shatara in the apartment, sitting on the couch with a gun within arm's reach. There were more drugs in the apartment. Finding defendant's testimony not credible, the trial court found defendant guilty of two counts of knowingly possessing less than 25 grams of a schedule 1 or 2 controlled substance.

I. IMPEACHMENT WITH PRIOR CONVICTION

Defendant first argues that the prosecutor acted improperly by informing the trial court at the beginning of the trial of his intent to introduce defendant's prior conviction of entering without breaking should defendant testify. He further asserts that the trial court abused its discretion by allowing introduction of the evidence when defendant testified and that trial counsel was ineffective for failing to object to the introduction of the conviction. We disagree.

The alleged errors, including the prosecutor's statement of intent to introduce the prior conviction and the admission of the prior conviction, are unpreserved and therefore reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); see also *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). To obtain a new trial on the basis of ineffective assistance, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012).

The first question is whether the admission of the prior felony conviction was plain error. Under MRE 609(a)(2), a witness's credibility can be attacked by a prior conviction containing an element of theft if "(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted," and "(B) the court determines that the evidence has significant probative value on the issue of credibility and . . . that the probative value of the evidence outweighs its prejudicial effect."

Defendant's prior conviction was for entering without breaking, which is entry into a structure or dwelling with the intent to commit a felony or larceny. MCL 750.111. According to his presentence investigation report, defendant was conviction involved the intent to steal copper pipes. Defendant did not argue below and does not argue on appeal that his prior offense did not contain an element of theft. Also, the crime is punishable by imprisonment of up to five years, so it qualifies under MRE 609(a)(2)(A).

Defendant only argues that the crime did not qualify under MRE 609(a)(2)(B), because its probative value was outweighed by its prejudicial effect. MRE 609(b) instructs that:

> For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

Although defendant's prior conviction was very recent, only one year earlier, the conviction was not highly indicative of veracity. Regarding the prejudicial effect, we note the conviction was not at all similar to the charged crime of possession of controlled substances. And, the conviction did not cause defendant not to testify. At worst, an objection to the admission of the conviction based on MRE 609(a)(2)(B) would have created a close evidentiary decision and, therefore, it was not plain error to allow admission of the conviction.

Next, defendant argues that the prosecutor committed misconduct by placing on the record that if defendant testified, the conviction would be used to impeach defendant. Again, defendant did not object to the prosecutor's statement and defendant cannot establish that it amounted to plain error affecting his substantial rights. Defendant was tried in a bench trial, and a judge in a bench trial is presumed to have decided matters based only on evidence properly before the court. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992). Moreover,

as discussed above, the conviction was admissible to impeach defendant. For this same reason, trial counsel was not ineffective for failing to object to the admission of the prior conviction. *People v Unger*, 278 Mich App 210, 256-257; 749 NW2d 272 (2008)(counsel is not ineffective for failing to raise a futile objection).

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A. FAILURE TO MOVE TO SUPPRESS EVIDENCE

Next, defendant argues that his counsel was ineffective for failing to move to suppress the drug evidence, which he maintains was illegally obtained. The Fourth Amendment protects against unreasonable searches and seizures. *People v Frohriep*, 247 Mich App 692, 699; 637 NW2d 562 (2001). "[I]f a police officer has a reasonable, articulable suspicion to believe a person has committed or is committing a crime given the totality of the circumstances, the officer may briefly stop that person for further investigation." *People v Barbarich*, 291 Mich App 468, 473; 807 NW2d 56 (2011).

Here, the preliminary examination testimony shows that Officer Maya responded to a call that someone was abducted at gunpoint at the apartment complex. He went to the third floor and immediately saw defendant exiting the apartment. Officer Maya spoke to defendant and ran his name on LEIN, confirming that defendant had a warrant for his arrest. Officer Maya intended to arrest defendant on the existing warrant. Defendant consented to a search, and Officer Maya found a clear plastic bag with suspected powdered cocaine and a piece of paper containing suspected heroin in the pocket of defendant's sweatshirt. Officer Maya asked defendant to turn around and saw a white powdery substance on his nose and inside his nostrils; he suspected it was cocaine. Officer Maya then arrested defendant.

Although warrants are required for a search, a person can waive his Fourth Amendment rights and consent to a search. *Frohriep*, 247 Mich App at 702. An officer may also search an arrested person for weapons and evidence without a search warrant. *Arizona v Gant*, 556 US 332, 335, 339; 129 S Ct 1710; 173 L Ed 2d 485 (2009). Here, Officer Maya testified that defendant consented to the search. Further, even if defendant had not consented, it is clear that Officer Maya had a reasonable, articulable suspicion that defendant had committed a crime and that he had an outstanding arrest warrant. Defendant could have been searched incident to his arrest on the outstanding warrant; therefore, a motion to suppress would have been unsuccessful. Defense counsel is not ineffective for failing to file a meritless motion. *Unger*, 278 Mich App at 255.

B. FAILURE TO INVESTIGATE

Defendant also argues that his counsel was ineffective for failing to investigate Shatara's mental health status and to then present that evidence to the trial court. Trial counsel's failure to investigate can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

Defendant must establish that but for counsel's deficient performance there was a reasonable probability that the outcome of the trial would have been different. *Trakhtenberg*, 493 Mich at 51. Defendant has not shown that trial counsel could have legally obtained

Shatara's medical and mental health records as they would have been privileged. Defendant has not suggested other ways trial counsel could have investigated Shatara's mental health status that would have led to admissible evidence. Officer Rivera testified at trial that he did not recall Shatara's demeanor when he encountered him in the apartment. Defendant has not established that further investigation would have resulted in admissible evidence or that, with the admissible evidence, there was a reasonable likelihood of a different trial outcome.

III. TRIAL COURT FINDINGS

Finally, defendant argues that the trial court made insufficient findings of fact regarding his duress defense and that the trial court failed to consider the lesser included offense of personal use of narcotics. Because defendant did not raise this issue in his "Statement of Questions Presented" as required by MCR 7.212(C)(5), he has waived the issue for this Court's review. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000).

Even so, we find that the trial court's findings of fact were sufficient regarding the defense of duress, and the evidence did not support a misdemeanor personal use charge. "If the trial court was aware of the issues in the case and correctly applied the law to the facts, its findings are sufficient." *People v Lanzo Constr Co*, 272 Mich App 470, 479; 726 NW2d 746 (2006). The trial court addressed the defense of duress when it found that defendant's testimony was not credible because: (1) the time sequence did not make sense; (2) it did not make sense that Shatara called the police; (3) defendant said that he was texting his girlfriend but claimed his phone was dead; and (4) it did not make sense that defendant was calm when he exited the apartment yet claimed to have been held against his will at gunpoint. The trial court specifically stated that it did not find defendant's testimony that he was held against his will and forced to take the drugs into his possession credible and that the prosecution had proved that defendant possessed the cocaine and heroin. The trial court was clearly aware of defendant's defense that he acted under duress, but it did not find credible defendant's testimony in this regard.

Also without merit is defendant's argument that the court erred by failing to consider the lesser included offense of "use" of an illegal substance. MCL 333.7404(1) and (2)(a) prohibit the "use" (rather than the "possession") of a schedule 1 or 2 controlled drug, which is a misdemeanor. The trial court did not specifically address this lesser offense, and defendant did not request that the trial court do so. Defendant is entitled to an instruction only if the use charge is a necessarily included offense of the possession charge and only if a rational view of the evidence supported giving the use instruction. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). There was no evidence to suggest that the cocaine and heroin found in defendant's pocket was for defendant's personal use. Defendant denied knowledge of what the substances were and explained that he was just guessing when he smeared cocaine on his nose at Shatara's request. Considering this evidence, the trial court did not err in finding defendant guilty of the charged offense of knowing or intentional possession of a schedule 1 or 2 controlled substance.

We affirm.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Kurtis T. Wilder